

COURT OF APPEALS
DIVISION TWO

V Á S Q U E Z, Judge.

¶1 After a bench trial, appellant Joey Ray Hernandez was convicted of promoting prison contraband, possessing a narcotic drug, possessing marijuana weighing less than two pounds, and possessing drug paraphernalia. On appeal, Hernandez argues the trial court erred in refusing to enter a judgment of acquittal on the charge of promoting prison contraband because he should have been charged with a lesser crime that applied more specifically to his conduct. For the reasons stated below, we affirm.

Facts and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the conviction. *State v. Miles*, 211 Ariz. 475, ¶ 2, 123 P.3d 669, 670 (App. 2005). In December 2005, Hernandez was an inmate at the Pima County Jail. The sheriff's department temporarily released him on his own recognizance to attend his mother's funeral. Upon his return, corrections officers acting on a tip conducted a strip search and a body-cavity search and placed Hernandez in a "dry cell."¹ Hernandez consented to an x-ray of his pelvic area, which revealed the presence of foreign objects. The objects were later identified as four balloons—two containing marijuana, one containing cocaine, and one containing two miniature syringes.

¶3 Hernandez was charged with promoting prison contraband, possession of a narcotic drug, possession of marijuana, and possession of drug paraphernalia. The trial court found him guilty of all charges and found that he committed the offenses while on probation

¹A "dry cell" was described as "a room without any plumbing facilities."

for another felony offense. Hernandez admitted having three prior felony convictions. The court sentenced him to an enhanced, presumptive, 15.75-year prison term for promoting prison contraband. On each of the remaining charges, the court placed him on three-year probationary terms, which the court ordered to run concurrently with each other and consecutively to the prison term. This appeal followed; we have jurisdiction pursuant to A.R.S. § 13-4033(A).

Discussion

¶4 Hernandez contends the trial court erred in refusing to enter a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., on the charge of promoting prison contraband.² He argues he should have been convicted of a “lesser offense” under a different statute that more specifically applies “under the facts of the case.”

¶5 We review the trial court’s denial of a Rule 20 motion for an abuse of discretion. *State v. Paris-Sheldon*, 214 Ariz. 500, ¶ 32, 154 P.3d 1046, 1056 (App. 2007). Such an abuse occurs when the trial court commits an error of law in exercising its discretion. *State v. Ross*, 214 Ariz. 280, ¶ 21, 151 P.3d 1261, 1264 (App. 2007). Hernandez challenges the applicability of the statute under which he was convicted. Therefore, “[t]he issue before us involves a question of statutory interpretation and

²Hernandez is not challenging his convictions for possession of a narcotic drug, possession of marijuana, or possession of drug paraphernalia.

application, a question of law that we review de novo.” *State v. Gonzalez*, 216 Ariz. 11, ¶ 2, 162 P.3d 650, 651 (App. 2007).

¶6 Hernandez was charged under A.R.S. § 13-2505, which provides: “A person, not otherwise authorized by law, commits promoting prison contraband . . . [b]y knowingly taking contraband into a correctional facility or the grounds of such facility.” Section 13-2501(1), A.R.S., defines contraband as “any dangerous drug, narcotic drug, marijuana . . . or other article whose use or possession would endanger the safety, security or preservation of order in a correctional facility” Subsection (2) of § 13-2501 defines correctional facility as “any place used for the confinement or control of a person . . . [c]harged with or convicted of an offense.” This definition plainly includes a jail. *State v. Adams*, 186 Ariz. 37, 38, 918 P.2d 1055, 1056 (App. 1995). If the contraband is a dangerous drug, narcotic drug, or marijuana, § 13-2505(C) makes the offense a class two felony.

¶7 In contrast, A.R.S. § 31-129, the statute Hernandez argues he should have been charged with violating, provides: “A person not authorized by law who takes into a jail or the grounds belonging or adjacent thereto, any opium, morphine, cocaine or other narcotic, or intoxicating liquor of any kind, or firearms, weapons or explosives of any kind, is guilty of a class 5 felony.” Hernandez contends that, because he was a jail inmate, § 31-129 is a more specific statute than § 13-2505, the prison-contraband statute. Therefore, he asserts, he should have been charged and convicted solely under § 31-129.

¶8 Hernandez correctly observes that § 31-129 carries a lesser penalty than § 13-2505 and also applies to his conduct in this case. But, “[w]hen conduct can be prosecuted under two or more statutes, the prosecutor has the discretion to determine which statute to apply,” *State v. Lopez*, 174 Ariz. 131, 143, 847 P.2d 1078, 1090 (1992), and “the courts have no power to interfere with the discretion of the prosecutor unless he [or she] is acting illegally or in excess of his [or her] powers,” *State v. Murphy*, 113 Ariz. 416, 418, 555 P.2d 1110, 1112 (1976). “The principle that specific law controls over the general applies only where the specific conflicts with the general.” *Sykes v. State ex rel. Williams*, 18 Ariz. App. 588, 590, 504 P.2d 529, 531 (1972); *see also State v. Lenahan*, 12 Ariz. App. 446, 471 P.2d 748 (1970), *overruled on other grounds by State v. Sample*, 107 Ariz. 407, 489 P.2d 44 (1971); *State v. Canez*, 118 Ariz. 187, 191, 575 P.2d 817, 821 (App. 1977).³

¶9 Section 13-2505 does not state or suggest that it applies only to prison-contraband cases, nor does the language of § 31-129 suggest it is the exclusive vehicle for prosecuting jail-contraband cases. *See Sykes*, 18 Ariz. App. at 590, 504 P.2d at 531. To the contrary, A.R.S. § 2501(2) includes in its definition of “correctional facility,” the term used in § 13-2505, any place used to confine a person “[c]harged with an offense”—a phrase

³The civil cases Hernandez relies upon are inapposite. *Smith v. Ariz. Citizens Clean Elections Comm’n*, 212 Ariz. 407, ¶ 29, 132 P.3d 1187, 1193 (2006) (when specific statute and general statute differ in time period for filing appeal, specific statute governs); *Ariz. State Tax Comm’n v. Phelps Dodge Corp.*, 116 Ariz. 175, 177, 568 P.2d 1073, 1075 (1977) (when provisions of special statute are inconsistent with related general statute, special statute controls). The cases do not speak to the situation present here, where two consistent statutes apply and the state has elected to charge under one of the two.

that could only apply to a jail facility. And, in *State v. Ulmer*, 21 Ariz. App. 378, 382, 519 P.2d 867, 871 (1974), the court held that disparity in punishment alone does not create a conflict. We therefore conclude Hernandez was properly charged with promoting prison contraband under § 13-2505, notwithstanding the existence of a more specific statute which also could apply to his conduct.⁴

¶10 Hernandez does not otherwise challenge the sufficiency of the evidence to support his conviction. Indeed, there was more than sufficient evidence for the court to find beyond a reasonable doubt that Hernandez had “knowingly tak[en] contraband into a correctional facility.” § 13-2505; *see also State v. Mathers*, 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990) (court should deny Rule 20 motion if, after viewing evidence in light most favorable to prosecution, rational trier of fact could have found essential elements of crime beyond a reasonable doubt).⁵

¶11 In sum, Hernandez was charged with promoting prison contraband, and the state proved him guilty of that crime. That he might be guilty of another crime with which

⁴The state correctly points out that § 31-129 only encompasses cocaine or other narcotics and does not include marijuana or drug paraphernalia, the other items Hernandez was charged with possessing.

⁵Although his argument is unclear, Hernandez also suggests that § 31-129 is a lesser-included offense of § 13-2505. Even assuming hypothetically that he were correct, the state proved every element of what would be the greater offense. Therefore, the trial court was not required to consider § 31-129 before finding Hernandez guilty under § 13-2505. *See State v. Wall*, 212 Ariz. 1, ¶ 18, 126 P.3d 148, 151 (2006) (instruction on lesser-included offense only required when trier of fact could find state failed to prove element of greater offense).

he was not charged is irrelevant; the prosecution acted entirely within its discretion in electing which offense to charge. *Lopez*, 174 Ariz. at 143, 847 P.2d at 1090; *State v. LaGrand*, 153 Ariz. 21, 30 n.4, 734 P.2d 563, 572 n.4 (1987). Because the trial court's verdict is supported by substantial evidence and Hernandez was not entitled to be charged exclusively under § 31-129, the trial court did not abuse its discretion in denying his Rule 20 motion.

Disposition

¶12 We affirm.

GARYE L. VÁSQUEZ, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

PHILIP G. ESPINOSA, Judge